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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 725

JOSEPH F. SCHIPANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

On retrial, the district court filed an opinion on the issue of tainted evidence (Pet. App. 21a–70a), which is reported at 289 F. Supp. 43, and an opinion on the issue of guilt (Pet. App. 74a–91a), which is reported at 293 F. Supp. 156. The district court on retrial also filed an opinion with its order denying the government's motion to withdraw its waiver of jury trial (Pet. App. 13a–20a), which is reported at 44 F.R.D. 461, and an opinion with its rulings on miscellaneous evidentiary motions (Pet. App. 71a–73a), which is not officially reported.

The opinion of the court of appeals in this second appeal (Pet. App. 1a–12a) is not yet reported. The opinion of the court of appeals relating to the first trial is reported at 362 F. 2d 825, and the order of this Court is found at 385 U.S. 372. The opinion of the district court regarding the first trial is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1969. On September 4, 1969, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to October 10, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Petitioner also relies on 28 U.S.C. 1651.

QUESTIONS PRESENTED

1. Whether the proceedings in the district court on remand were inconsistent with the prior mandate of this Court.

2. Whether the district court clearly erred in finding beyond a reasonable doubt that the proof of guilt was not based on leads from illegal electronic surveillance.

3. Whether the district court clearly erred in finding by a preponderance of the evidence that the government was not prompted to investigate and prosecute petitioner for income tax evasion by reason of illegal electronic surveillance.

STATEMENT

Having waived trial by jury, petitioner was convicted of willfully attempting to defeat and evade in-

come taxes by failing to file income tax returns for 1956, 1957, 1958, 1959 and 1960, in violation of 26 U.S.C. 7201 (Pet. App. 2a). The government relied on net worth proof of unreported income and negated non-taxable sources of income (Pet. App. 81a–83a).[1] Petitioner introduced no evidence at trial relating to the merits of the indictment (Pet. App. 88a). After petitioner's conviction in 1965 on this same indictment, and after this Court had, on November 7, 1966, denied his petition for certiorari, the Solicitor General, on November 30, 1966, filed in this Court a memorandum which, insofar as pertinent to the electronic surveillance issue in this case, made the following representations (Pet. App. 93a–97a):

> 2. Since November 21, 1966, the following additional facts have come to the Solicitor General's attention:
>
> (*a*) In response to a memorandum of October 24, 1966, from the Tax Division of the Department of Justice, the Federal Bureau of Investigation informed the Acting Attorney General, by memorandum of October 28, 1966, that, although petitioner was not the subject of direct electronic surveillance by agents of the F.B.I., he was a participant in various conversations electronically monitored on a number of occasions in 1961. The microphone was installed, by means of a trespass, at a place of business where petitioner and others frequently met. It was believed by the F.B.I. that this establishment was being utilized for purposes

[1] The net worth proof introduced at the first trial was received in evidence by stipulation at the instant trial (Pet. App. 4a).

connected with organized crime. The Federal Bureau of Investigation, acting on the basis of the Departmental authorization as previously described at pages 2-3 of the Supplemental Memorandum for the United States filed in *Black* v. *United States,* Oct. Term, 1965, No. 1029, approved the installation here in question.

(*b*) The substance of the monitored conversations involving petitioner and others was recorded in logs kept by the F.B.I. agents who conducted the electronic surveillance, and was reflected in various F.B.I. reports which came to the attention of those in charge of investigating and prosecuting petitioner for possible tax violations. The reports did not disclose the manner in which the information contained therein had been obtained. Following receipt of the F.B.I.'s memorandum of October 28, 1966, noted above, attorneys of the Department of Justice obtained the relevant F.B.I. logs and examined them in detail in order to make an informed judgment about the matter.

3. Unlike the situation in *Black* v. *United States,* we cannot say in the instant case that none of the evidence used by the government at petitioner's trial was obtained, either directly or indirectly, from an improper source. Some of the material in the F.B.I. reports (which were based in part on the electronic surveillance) provided investigatory leads and other information used in proceeding against petitioner. Since there was material evidence against petitioner which was tainted, his conviction cannot stand, and no purpose would be served here in having the district court con-

duct a collateral hearing, such as was suggested by the government in its memorandum in *Black*. We concede, moreover, that petitioner would have standing to object to the introduction of the evidence obtained as a result of the electronic surveillance. Although he was not the owner of the establishment under surveillance, he was at least an "invitee" on the premises within the meaning of *Jones* v. *United States,* 362 U.S. 257.

* * * * *

5. In light of the foregoing, and in view of this Court's decision and *per curiam* opinion in the *Black* case, we suggest that the Court vacate its order denying certiorari, grant certiorari, vacate the judgment of the court of appeals, and remand the cause to the district court for a new trial, should the government seek to prosecute petitioner anew.[6]

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[6] On November 29, 1966, while preparing to file this memorandum, we learned that agents of the Alcohol and Tobacco Tax Division of the Treasury Department had engaged in electronic surveillance of another establishment frequented by petitioner. Logs were not maintained and we are unable at this juncture to provide a full statement of the relevant facts. Although our information is incomplete, it appears that the surveillance lasted for a brief period and that no relevant information relating to petitioner was obtained. Investigation of this matter will be continued and no further prosecution of petitioner will be instituted in advance of its completion. Since, however, the facts stated in the text of this memorandum call, without more, for the disposition which we are suggesting, we are filing the memorandum without further delay. In the event that the government should seek to proceed further against petitioner, all additional information which we obtain will be made known to the district court.

Subsequently, this Court issued the following order and mandate (385 U.S. 372):

> Upon the suggestion of the Solicitor General and upon an independent examination of the case, the petition for a rehearing is granted, the order of this Court denying certiorari is vacated, certiorari is granted, the judgment of the United States Court of Appeals for the Second Circuit is vacated and the case is remanded to the United States District Court for the Eastern District of New York for a new trial should the Government seek to prosecute petitioner anew.

Following remand, petitioner filed a motion in the district court to suppress all evidence obtained as a result of any electronic surveillance (Pet. App. 15a). The government revealed all relevant surveillance logs and the files of the Department of Justice, the Federal Bureau of Investigation, and the Intelligence and the Alcohol and Tobacco Tax Divisions of the Treasury Department (Pet. App. 15a). At the hearing of the motion to suppress, the government presented the testimony of the numerous agents and attorneys involved in the 1961–1963 investigations of petitioner and the review thereof which was made by the Department of Justice in 1966. All information in F.B.I. reports relating to petitioner and obtained as a result of electronic surveillance was underlined in red pencil by the F.B.I. "case agent" assigned to the investigations of petitioner (Pet. App. 22a–23a).

At the hearing on the motion to suppress, Special Agent Masetti of the Intelligence Division, who made the investigation of petitioner's net worth, testified that all items of proof relating to petitioner's net

worth were obtained from leads and sources unrelated to electronic surveillance.[2] Agent Masetti testified that during his investigation and the first trial he was unaware of any electronic surveillance of petitioner by the F.B.I. He testified that he had hearsay information that the Alcohol and Tobacco Tax Division had engaged in an attempt at electronic surveillance of petitioner but that the device had not worked. He identified Exhibit No. 1 as a summary chart showing the actual investigative source of all the items of net worth proof used in computing petitioner's income (Pet. App. 6a, 15a, 32a–33a).

The district court found "beyond a reasonable doubt" that the government's proof of petitioner's net worth was free of taint (Pet. App. 62a). The court found that certain likely sources of increases in net worth which had been proved at the first trial[3]

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[2] The bulk of the leads to expenditures was discovered by tracing out money orders purchased by petitioner at New York banks. Petitioner's use of money orders was discovered by visual surveillance of his activities at banks (Pet. App. 32a–33a, 39a, 82a, 86a; Tr. 66–68, 190–192). "Tr." refers to the stenographic transcript of proceedings at the 1968 retrial.

[3] A "likely source" is one way of proving that the increases in net worth are attributable to taxable income. *Holland* v. *United States*, 348 U.S. 121, 137–138. In petitioner's first trial, the government proved that taxpayer was partial owner of the Casa Bianca restaurant, and that he was involved in labor relations activities as a "go-between" (Pet. App. 60a). These "likely sources" had been known to the government prior to the institution of any electronic surveillance, but the district court held that references thereto gleaned through electronic surveillance "might have filtered" through from the F.B.I. to the Treasury Department investigators and "may have freshened up the

had not been shown beyond a reasonable doubt to be free of taint, and all such evidence was thus ordered suppressed (Pet. App. 62a–63a, 70a). As to whether the government was prompted to single out petitioner as a subject of income tax investigation and prosecution by reason of illegally acquired information, the court ruled that the government had established by a preponderance of evidence and possibly by clear and convincing evidence, but not beyond a reasonable doubt, that tainted information did not prompt the government to intensify its investigation by the Intelligence and the Alcohol and Tobacco Tax Divisions of the Treasury Department (Pet. App. 62a–70a).

ARGUMENT

1. Petitioner's contention (Pet. 42–50) that it is "unthinkable" that this Court meant to empower the trial court to reexamine the evidence on the taint issue is without merit, as seen from the plain language of this Court's order (*supra*, p. 6). The court of appeals correctly pointed out (Pet. App. 52a–56a) that this Court merely directed that a new trial should be held, should the government so desire, and declined to grant petitioner's request for a remand with directions to dismiss the indictment.

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government's legitimate leads and caused it to concentrate more intensively" thereon. The court found that the government had maintained its burden on this aspect of the case "by a preponderance of the evidence and possibly by clear and convincing proof—though not beyond doubt * * *," and held as a matter of law that evidence must be suppressed if it was discovered through both legal and illegal leads (Pet. App. 45a, 60a–62a).

Moreover, it is clear that the district court, in making a thorough review of all the evidence bearing on taint and in exercising a selective judgment as to what evidence was tainted and should be suppressed, complied precisely with the mandate of this Court. There is thus no need for separate discussion of the propriety of petitioner's application in the court of appeals for a writ of mandamus or prohibition (Pet. 3–4, 6, 59). As the proof of income and the negation of non-taxable sources were found free of taint, there is, as well, ample evidence to validate the indictment despite the suppression of the "likely source" evidence. See *United States* v. *Blue*, 384 U.S. 251, 255.

2. Petitioner's contention that the courts below erred in finding no taint in the net worth proof (as distinguished from "likely source" proof) is without merit. The question would seem to be what the record now shows after the extent and ramifications of electronic surveillance have been fully disclosed and explored, and not how accurately the Department of Justice anticipated this record in November 1966 in the accelerated survey and tentative conclusions which were required at that time. In fact, the district court's order suppressing the evidence of "likely sources" has borne out the essential conclusion then reached by reviewing officials as to the fact that some trial evidence was tainted. The review memorandum by departmental attorney O'Brien (Pet. App. 98a–107a) revolves in the main, and entirely insofar as specifics were mentioned, on the question of taint *vis-à-vis*

"likely sources." And the representation in the Solicitor General's memorandum to this Court (Pet. App. 25a) that some of the evidence was tainted has proven literally true in view of the district court's findings. It is not now an issue whether departmental officials anticipated more taint than proved to be true. In November 1966 the question was whether they could fairly represent to this Court, as they had been able to do in *Black* v. *United States*, 385 U.S. 26, that no evidence used in petitioner's trial was obtained directly or indirectly from an improper lead. These representations necessarily involved subjective beliefs, and where assumptions were required they were understandably indulged in favor of petitioner.

Special Agent Masetti of the Intelligence Division, who bore the responsibility for the investigation and recommendations as to prosecution, testified that he had no leads to net worth items other than those identified in his summary schedule (Pet. App. 33a). Petitioner's use of the crucial money orders was first discovered on July 17, 1961, by a visual surveillance of his activities, which at times involved six to eight agents of the Alcohol and Tobacco Tax Division (Pet. App. 38a–39a). Both Masetti and the surveillance agents testified they had no personal or hearsay knowledge of the existence of the F.B.I. electronic surveillance which began in January 1961 (Pet. App. 33a). The Alcohol and Tobacco Tax Division attempted to establish electronic surveillance of petitioner by installing two devices in a Brooklyn health club from August

21, 1961, to September 8, 1961. However, one device did not work and no conversation including petitioner or any information concerning him was received on the other (Pet. App. 39a; Tr. 233–234).

While petitioner alludes (Pet. 33) to Agent Masetti's use of information acquired from his predecessor, who in turn had examined F.B.I. files, the district court found that the F.B.I. material referred to was a report dated October 10, 1960, before any electronic surveillance began (Pet. App. 33a). In summary, there is no evidence whatever to contradict the district court's finding that the government's net worth proof was derived from leads completely unrelated to any electronic surveillance activities.

3. Petitioner's contention (Pet. 55) that the district court erred in concluding that the government was not prompted to investigate or prosecute petitioner by reason of electronically acquired information is without merit. Petitioner was known to the F.B.I. at least since 1958 as a leading racketeering figure, and prior information indicated petitioner's interests in a restaurant, in a carting business and in labor relations activities (Pet. App. 26a–27a, 61a–62a, 68a–70a). He demonstrated a consistently high standard of living yet had failed to file any income tax returns (Pet. App. 38a, 69a). The Alcohol and Tobacco Tax Division surveillance which resulted from the January 1961 decision to begin a preliminary tax investigation had revealed petitioner's use of an automobile registered to another person, and his extensive use of money orders and of cash in paying bills (Pet. App. 38a–39a). As found by the district court (Pet. App.

70a) and the court of appeals (Pet. App. 8a), the tainted information did not significantly contribute to the progress of the investigation or encourage the investigators in any substantial way.[4]

4. Rather than attempting to discuss further the various points raised by petitioner, we instead rely on the careful and painstaking opinions of the district court (Pet. App. 13a–91a) and the thorough discussion of the principal issues in the court of appeals' opinion (Pet. App. 1a–12a) as showing that his claims, taken singly or collectively, are without substance and that he was properly convicted at the second trial of the offenses charged.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1969.

[4] The Tony Ricci electronic surveillance mentioned in the petition (Pet. 57–59) was found by the district court to have no bearing on petitioner's case because petitioner's name was not mentioned, his voice was not recorded, and none of his activities was mentioned. Petitioner's complaint that the district court determined these matters without allowing him to inspect the logs is without merit. See *Taglianetti* v. *United States*, 394 U.S. 316.

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